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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 4, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129

Dear Ms. Salas:

Pursuant to Section 1.44 and Section 1.419 of the Commission's rules, attached is an original and nine (9) copies of a Motion for Stay Pending Judicial Review to be filed in the above-captioned docket.

Please acknowledge receipt by affixing an appropriate notation on the copy of the Motion for Stay furnished for such purpose and remit same to bearer.

Sincerely,

Mary L. B

Mary L. Brown

No. of Copies rec'd 0+4
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	)	CC Docket No. 94-129
	)	
Policies and Rules Concerning Unauthorized Changes of Consumers by Long Distance Carriers	)	

MOTION FOR A STAY PENDING JUDICIAL REVIEW

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Counsel for MCI WorldCom, Inc.

Dated: May 4, 1999

SUMMARY

Movant MCI WorldCom respectfully requests that the Commission stay pending judicial review the liability rules adopted in the Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129. Movant has filed a petition in the United States Circuit Court of Appeals for the District of Columbia seeking to vacate and remand these rules, MCI WORLDCOM, Inc. v. Federal Communications Commission, et al., No. 99-1125, and is likely to succeed on the merits in that case. Movant also satisfies the equitable requirements for issuance of a stay. If the Commission declines to grant a stay, MCI WorldCom intends promptly to move for a stay in the Court of Appeals.

MCI WorldCom is likely to succeed on the merits in overturning the liability rules on one or more of the grounds it has raised in the court of appeals. First, the rules undermine the statutory scheme set out in § 258 of the Telecommunications Act, 47 U.S.C. § 258(a). Congress there created incentives for the preferred carrier to protect its customers from unauthorized carrier changes by allowing the preferred carrier to collect from the unauthorized carrier all charges it collected from the customer. The Commission's rules undermine this scheme by absolving the customer from paying any charges at all during the first 30 days of service, and, in the event that the customer does pay the unauthorized carrier, by refusing to allow the preferred carrier to keep all charges it collects from that carrier. Second, the Commission had previously rejected just such an absolution scheme, but in the Order it does not articulate a reasoned explanation for its change of direction. Third, the new rules are irrational. They impose extraordinary burdens upon (and create conflicts of interest for) the preferred carrier, requiring it to adjudicate its own

customers' slamming complaints, when it obviously stands to gain by finding the complaints meritorious.

Equally irrational is the Order's implementation schedule, which requires all carriers to implement the liability rules by May 17, 1999, even though the systems necessary to implement the re-rating cannot possibly be developed by that date. This deadline is especially irrational given that the Order acknowledges that the public would be better served if a privately-funded neutral third party administrator handled slamming complaints, and the Commission has offered to waive its unworkable and irrational rules if such a "TPA" proposal were implemented. MCI WorldCom along with other carriers have made just such a proposal, and it is irrational to require them to undertake the extraordinary effort necessary to implement the Order's procedures while their requests that those very procedures be waived is pending at the Commission, and is likely to be granted.

Finally, MCI WorldCom plainly meets the equitable requirements for a stay. The Commission's rules require MCI WorldCom to spend millions of dollars to implement a system by May 17 when the FCC is likely, shortly thereafter, to waive the very rules the system is designed to implement, and at the same time it is reconsidering those deeply flawed rules. The inevitable result of compliance with the liability rules is that MCI WorldCom and other carriers will waste millions of dollars struggling to patch together an interim process to comply with rules that are not likely to survive either the carriers' requests for a waiver, the carriers' requests for reconsideration, or MCI WorldCom's petition for judicial review. Premature compliance also will generate consumer confusion and dissatisfaction. By avoiding the confusion and dissatisfaction the liability rules will promote, a stay will greatly benefit the public, while harming no one.

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Federal Communications Commission
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MOTION FOR STAY PENDING JUDICIAL REVIEW

MCI WORLDCOM, Inc. ("MCI WorldCom"), though its undersigned counsel, moves the Federal Communications Commission (the "FCC" or the "Commission") to stay pending judicial review the liability rules set forth in the Second Report and Order (the "Order") issued on December 23, 1998, in Second Report and Order and Further Notice of Proposed Rulemaking, In re Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, 14 Communications Reg. (P & F) 799 (rel. Dec. 23, 1998) ("Order").[1/] The Order imposes on telephone carriers complex procedures that must be followed when a customer alleges "slamming" -- i.e., an unauthorized switch of his or her carrier. In particular, the Order alters the allocation of liability in "slamming" situations. Absent a stay, these rules and procedures are scheduled to take effect on May 17, 1999.

[1/] The rules in question are 47 C.F.R. §§ 64.1100(c), 64.1100(d), 64.1170 and 64.1180. See Order, ¶ 56 & n.179.

STATEMENT OF THE CASE

In § 258 of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 258(a), Congress expressly prohibited the unauthorized assignment of a consumer's telephone service to a particular carrier. Specifically, § 258(a) of the Act prohibits any carrier from "execut[ing] a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." 47 U.S.C. § 258(a).

Section 258(b), in turn, establishes the remedy for any such unauthorized carrier change:

> Any telecommunications carrier that violates the verification procedures described in subsection (a) of this section and that collects charges for telephone exchange [i.e., local] service or telephone toll [i.e., long-distance] service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber. . . .

47 U.S.C. § 258(b). Because the unauthorized carrier must disgorge any money it collects from a slammed customer, the statute eliminates the primary incentive to engage in slamming. Moreover, because preferred carriers are entitled to <u>all</u> charges paid to unauthorized carriers, the statute gives preferred carriers an incentive to pursue slamming complaints.

In July 1997, the Commission issued a Further Notice of Proposed Rulemaking to implement the requirements of § 258, and sought comment regarding carrier-to-carrier and carrier-to-subscriber liability for slamming. The Notice also sought comment on the efficacy of the FCC's existing rules on unauthorized conversions.

On December 23, 1998, the FCC released the Order, in which, over the objection of two Commissioners, it replaced its existing rules with a complex scheme that is in derogation of the very statute it purports to implement. Ignoring the incentive structure of § 258(b), the Commission substituted what it called an "absolution" rule: no carrier is entitled to any compensation for the first thirty days after an unauthorized change occurs. Order ¶¶ 13-14, 18, 19.

Under the Commission's rules, if the customer nevertheless does pay the unauthorized carrier, that carrier is required to remit to the preferred carrier all charges paid.[2/] Notwithstanding the statutory mandate that the preferred carrier is entitled to recover "all charges," under the FCC's scheme the preferred carrier must then return to the customer the difference between what the customer paid the unauthorized carrier and what she would have paid the preferred carrier. This process is commonly referred to as "re-rating."

Two commissioners dissented from these portions of the Order, on the ground that the absolution and re-rating requirements plainly are inconsistent with the Act. See Order (Statement of Commissioner Michael K. Powell, concurring in part and dissenting in part) ("Powell Stmt"); Order (Dissenting Statement of Commissioner Harold Furchtgott-Roth) ("Furchtgott-Roth Stmt"). As they observed, under § 258(b) the unauthorized carrier is liable to the preferred carrier for all charges collected from the slammed consumer, and "[t]he statute provides for no exception to this all-inclusive language." Powell Stmt at 2; see also Furchtgott-Roth Stmt at 2 ("the Commission's rules directly conflict with the statute"). These Commissioners concluded that in requiring the preferred carrier to refund monies to

2/ The unauthorized carrier must also pay the preferred carrier any billing and collection expenses the preferred carrier incurs in its effort to collect the charges, and any charges associated with restoring the customer to his or her preferred carrier.

the consumer, the FCC "overstepped [its] legal authority." Powell Stmt at 2; see also Furchtgott-Roth Stmt at 1-2.

Acknowledging that its absolution rule creates perverse incentives for customers to assert false claims of unauthorized conversions, the FCC fashioned an elaborate set of procedures designed to ascertain whether the conversion was, in fact, authorized. These procedures require the preferred carrier to investigate and adjudicate slamming complaints. If a customer has not paid the allegedly unauthorized carrier, the unauthorized carrier must submit a claim to the preferred carrier for the purportedly valid charges, and the preferred carrier then becomes responsible for reviewing the evidence and determining, within 60 days, whether a change was, in fact, authorized.

On the other hand, if the customer has paid the allegedly unauthorized carrier, the preferred carrier must obtain information much of which under current procedures it has no way to obtain: the name of the unauthorized carrier, a copy of the customer's bill, usage data so that it can understand why the customer was billed the way it was, records of any amount the unauthorized carrier received from the consumer and any amount paid to switch the customer back to the preferred carrier. The preferred carrier then must "re-rate" the customer's bill and provide the appropriate refund.

The Commission itself readily acknowledged that the elaborate regulatory scheme it devised is not, by any means, the best solution to the slamming problem. In the Order, the FCC proposed an alternative regime in which an independent third-party administrator ("TPA") would investigate and resolve slamming complaints. Order ¶ 55. Finding that such a regime "might better serve to address our concerns," id., the Commission encouraged carriers to develop a TPA proposal and indicated that, if an adequate proposal were submitted, it would "be open to receiving requests for waiver of the liability provisions of our rules for carriers that agree to implement" such an alternative. Id. The FCC then delayed the effective date of the liability rules until May 17, 1999. Id. at ¶¶ 18, 56 (90 days after publication in the Federal Register).

On March 30, 1999, on behalf of virtually the entire long-distance industry, MCI WorldCom filed a TPA proposal with the Commission.[3/] In that submission, and in a related filing the same day, MCI WorldCom explained that a TPA could be operational within six months. Accordingly, MCI WorldCom asked the Commission to defer implementation of the rules for that period to allow the TPA to be established. MCI WorldCom also requested, in the alternative, that the FCC enter a stay, because carriers simply could not comply with the existing rules by May 17. Through a supporting affidavit (attached hereto at Tab A), MCI WorldCom demonstrated that carriers lack the systems necessary to exchange the vast amounts of data necessary to comply with the re-rating portion of the rules.[4/] MCI WorldCom argued as well that, given that the Commission had indicated it would be willing to waive the liability rules in any event, it would be particularly

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3/ The TPA proposal was supported by AT&T, Sprint, Excel, Quest, Cable & Wireless, Comptel, Telecommunications Resellers Association and Frontier.

4/ Because the rates a customer would have been charged by the preferred carrier varies depending on the date and time of the call, the preferred carrier can only re-rate calls if the unauthorized carrier provides it with detailed call data. If only one or two complaints were processed each week, the preferred carrier could conceivably process this information manually. But as the Commission noted, literally tens of thousands of such complaints are processed each year. See Order ¶ 2. Thus, to implement the Commission's rules, carriers would have to exchange electronically relevant price and call data. No system currently exists, however, that would allow them to do so. See Declaration of Sally Ann McMahon In Support of Joint Motion for Extension of Effective Date of Rules Or, in the Alternative, for a Stay ("McMahon Decl.") ¶ 27 (originally filed with Motion for Extension of Effective Date, copy attached at Tab A). Such a system would be vast, electronically bonding each of the hundreds of carriers within the industry. See id.

irrational to require the industry to expend the vast resources needed to develop the envisioned systems.

At the same time, a dozen carriers filed petitions for reconsideration of the Order, demonstrating that the rules were contrary to the statute, irrational, and utterly unworkable,[5/] and MCI WorldCom filed the instant petition for review.

The Commission has not acted on MCI WorldCom's TPA proposal, its waiver request, its stay motion, or on any of the petitions for reconsideration. Consequently, the liability rules are scheduled to take effect on May 17, 1999.

ARGUMENT

It is well settled that a stay should be granted where 1) the movant is likely to prevail on the merits of the appeal; 2) the movant will likely suffer irreparable harm absent a stay; 3) others will not be harmed if a stay is issued; and 4) the public interest will not be harmed. See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977). "The test is a flexible one." Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Relief should be granted if a movant demonstrates "either a high likelihood of success and some injury, or vice versa." Id. (citing Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985)). An "absolute certainty of success" on the merits is not required. Id. Indeed, a stay should issue "even though [the Court's] approach may be contrary to movant's view on the merits," as long as the movant makes a substantial showing on the other factors. Washington Metro. Area Transit, 559 F.2d at 843. Each of the criteria for a stay is easily satisfied here.

[5/] In support of its stay motion before the Commission, MCI WorldCom cited the filing of the pending petitions for reconsideration.

I. MCI WorldCom Is Likely To Prevail On The Merits.

MCI WorldCom will prevail on its legal claim that the Commission acted arbitrarily, capriciously and unlawfully by adopting rules that establish the liability of customers and carriers in the event of an unauthorized carrier change, and that establish the procedures that carriers must follow when a customer claims an unauthorized conversion. See 5 U.S.C. § 706(2)(A) ("[T]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). We discuss these dispositive legal claims seriatim.

A. The Order Undermines The Statutory Scheme Prescribed In § 258.

Section 258(b) was enacted by Congress in 1996 in direct response to the Commission's existing slamming rules. While these rules allowed unauthorized carriers to collect from customers the amount of charges the customer would have paid if the unauthorized change had never occurred, they did not require the unauthorized carrier to transfer any monies to the preferred carrier. See In re Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Report and Order, 10 F.C.C.R. 9560, ¶ 37 (1995) ("1995 Order"). In enacting § 258(b), Congress recognized that permitting unauthorized carriers to retain charges they collect from customers -- and thereby profit from the "slam" -- encouraged slamming and removed any incentive for preferred carriers to police against slamming. Section 258(b) addressed this concern by requiring unauthorized carriers to compensate preferred carriers for the entire amount the customer paid the unauthorized carrier, thereby removing the profit from slamming and creating an incentive for preferred carriers to protect their customers from the offensive business practices at issue.

The Commission's new liability rules, however, eviscerate this incentive scheme and supplant it with a wholly irrational scheme of the Commission's own creation. As two Commissioners stated in dissent, the rule absolving customers of liability for the first 30 days after the unauthorized conversion will discourage the preferred carrier from policing slamming practices because there will frequently be no payments by the customer to the unauthorized carrier for the preferred carrier to collect. See Furchtgott-Roth Stmt at 2 and Powell Stmt at 2. The new rules also unlawfully transfer the "policing" role in cases where a customer has not made any payments from the preferred carrier to the customer herself. Order ¶ 20. This is not even remotely similar to the incentive scheme set out in the statute.

Additionally, the Commission's re-rating rule requiring a preferred carrier to refund to the customer any amount collected from the unauthorized carrier that exceeds what the customer would have paid had it not been slammed directly conflicts with § 258(b)'s explicit requirement that the preferred carrier is entitled to recover "all charges" paid by the customer after the unauthorized change, and also alters the incentive scheme that lies at the heart of the statute.

It was arbitrary and capricious and directly contrary to the statute for the Commission to substitute for the rational remedial scheme imposed by the Congress an inconsistent and incoherent scheme of its own.

B. The Commission's Absolution Rule is Arbitrary and Capricious.

Without reasoned explanation, the Commission adopted the absolution rule, allowing slammed customers free telephone service for 30 days, despite having explicitly rejected absolution as a policy matter in its 1995 Order. See 1995 Order ¶ 37. This it cannot do. See Telecommunications Research and Action Ctr. v. FCC, 800 F.2d 1181, 1184 (D.C. Cir. 1986) ("When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms."). Indeed, many of the justifications that the Commission now provides in support of absolution it specifically rejected in the 1995 Order. For example, the Commission now justifies absolution based on the fact that customers deserve some compensation "for the time, effort, and frustration they experience as a result of being slammed, as well as for the loss of choice and privacy." Order ¶ 21. In the 1995 Order, however, the Commission rejected this very ground as justification for absolution. See 1995 Order ¶ 37.

The Commission also fails to explain why it has now concluded that it makes sense to allow customers who receive service not to pay for that service. In the 1995 Order, the Commission concluded to the contrary that when a customer has been slammed, she nevertheless still receives a service for which she should pay. See 1995 Order ¶ 37. The Commission now takes the opposite view, but with no articulated rationale.

Finally, the Commission fails to explain rationally the perverse subscriber incentives created by its so-called absolution rule. The rule provides an incentive for customers not only to lodge false slamming claims in the hope of receiving free service for the 30-day period, but also to delay reporting unauthorized changes in order to maximize their period of free phone service. The Order does not even attempt to address these compelling concerns.

C. The Commission's Procedures, And The Timetable For Their Implementation, Are Arbitrary And Capricious.

As if all of that were not enough, the Commission's rules create a complex, immensely burdensome, and inherently unfair set of procedures that carriers must follow once a customer complains that an unauthorized change has occurred. As a practical matter, the Commission's rules place almost the entire burden of addressing the slamming complaint on the customer's preferred carrier, requiring that carrier both "to provide relief to its slammed subscribers and to determine whether its subscriber was slammed." Order ¶ 55. Moreover, the timetable for achieving compliance with these new procedures is entirely unreasonable, and no evidence on the administrative record supports the FCC's understanding that the rules can, as a practical matter, be implemented within 90 days.

Under the Commission's scheme, when a customer reports an unauthorized change, the preferred carrier must determine whether an unauthorized change has occurred. Id. ¶ 42. But the Commission provides no rational basis for assigning this investigatory and adjudicative role to the customer's preferred carrier. Equally troubling is its failure to explain why the preferred carrier alone should have to bear the administrative expense and burden of resolving the dispute.

The Commission also fails to acknowledge, much less address, the inherent conflict of interest created by its approach. After all, if the preferred carrier agrees that the customer did not authorize the carrier change, it gets the customer back, and also is able to collect any fees that the customer has paid to the unauthorized carrier. On the other hand, if the preferred carrier concludes that the customer was wrong and the carrier change was authorized, the preferred carrier loses both the customer and the revenue, and most probably any chance to win back the customer in the future.

The Order fails to address this significant conflict of interest, and is devoid of any safeguards to mitigate these incentives for self-dealing. The rules merely state that the preferred carrier "shall conduct a reasonable and neutral investigation" into the customer's claim, and that if an unauthorized carrier contends that the preferred carrier's investigation or resolution of the claim is "in any way improper or wrong," it has the option of filing a § 208 complaint with the Commission. Id. ¶ 42. Given the huge number of disputed carrier changes that will need to be resolved annually under the Order's new procedures, and the biases built into the Commission's procedures, this is a recipe for disaster.

The Commission's timetable for implementation of its slamming rules and procedures also lacks any rational basis, and is therefore arbitrary and capricious. The new rules require the preferred carrier to make a difficult calculation every time one of its customers claims to have been "slammed." Specifically, it must determine what that customer would have paid had it been billed by the preferred carrier, and refund to the customer the difference between that number and the amount the customer in fact paid to the unauthorized carrier. Because the customer's charges might vary depending on the date and time of the call, the preferred carrier can only "re-rate" calls if the unauthorized carrier provides it with detailed call data. If only one or two complaints were processed each week, and if the unauthorized carrier were to cooperate, the preferred carrier conceivably could process this information manually. But as the Commission noted, literally tens of thousands of such complaints are processed each year. See Order ¶ 2.

Thus, to implement the Commission's rules, carriers of any size will have no choice but to develop electronic systems that interconnect with other carrier's billing and usage systems, so that they can exchange relevant price and call data electronically. But under the current practice, the preferred carrier generally is not even aware that its customer has been "slammed," and does not know which competitor has taken away the customer. The new rules are silent about how the preferred carrier is to obtain this information, and it is silent about the fact that no system currently exists that would allow for the exchange of the necessary billing and usage data. McMahon Decl.¶ 27.

Though fully apprised of these undisputed facts, the Commission has ordered that the new slamming rules and procedures become effective 90 days after Federal Register publication of the Order; that is, by May 17, 1999. Id. ¶¶ 18, 56. No record evidence supports the proposition that this is a reasonable deadline, and it is not. Compliance with that deadline simply is not feasible. McMahon Decl. ¶ 22.

The FCC's time frame is all the more irrational because pursuant to the Commission's own rules, carriers such as MCI WorldCom that take part in the TPA system are likely to be given waivers excusing them from these burdensome requirements before they have been able to construct the necessary computer systems, but after the May 17 compliance deadline. Absent a stay, while that proposal and waiver request are pending before the Commission, the Commission's rules require MCI WorldCom and other carriers to develop elaborate systems and processes to comply with rules that are likely to be waived before those systems are ever even implemented. The Commission is well aware of all of this, yet refuses to concern itself with the irrationality of its compliance schedule.[6] This is the height of arbitrary and capricious agency action.

II. MCI WorldCom And Others Would Suffer Irreparable Harm If The Liability Rules Are Not Stayed.

As is readily apparent from the previous discussion, the equities here overwhelmingly favor the entry of a stay. To comply with the liability rules, MCI WorldCom would have to spend millions of dollars, which it could never recover, to develop computer systems that are likely to prove unnecessary. The requisite systems would enable MCI WorldCom to process and exchange with other carriers the detailed billing, collection and usage information needed for re-rating. But if, as is likely, the FCC ultimately accepts MCI WorldCom's waiver and allows it to opt out of the FCC procedures, or if those procedures are changed on reconsideration or on appeal, these resource-draining efforts will be for naught.

The great expense necessary to implement the current rules in and of itself powerfully supports MCI WorldCom's equitable entitlement to a stay because, absent a stay, MCI WorldCom will be forced to "incur compliance costs while the possibility of changes to [these] requirement[s] still exists." Order, In re Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, 13 F.C.C.R. 6427, ¶ 3 (1998); see also Memorandum Opinion and Order, In re Rules and

[6] As previously indicated, at the same time it filed its TPA proposal and request for a waiver, MCI WorldCom also filed with the Commission a request that it extend the May 17 deadline to give the Commission the opportunity to consider, and the industry an opportunity to implement, the TPA proposal. At the same time, MCI WorldCom pointed out the many infirmities of the Commission's regulations, and the fact that many carriers had filed petitions for reconsideration of the Commission rules. But the Commission has refused to act on MCI WorldCom's motion for extension of time.

Policies Regarding Calling Number Identification Service -- Caller ID, 11 F.C.C.R. 17466, ¶ 6 (1996) (staying application of rule pending reconsideration because the requirements "may be modified as a consequence of information received in response to the . . . Reconsideration Petition"); Memorandum Opinion and Order, In re Rules and Policies Regarding Calling Number Identification Service -- Caller ID, 13 F.C.C.R. 5137, ¶ 1 (1998) (staying application of rule "until the Commission addresses [a pending] petition for reconsideration").

Moreover, the harm here plainly is irreparable. MCI WorldCom will be unable to recoup the money it spends to create the systems necessary to comply with the Order. Even if it chooses to pass some of these costs on to its customers, it will never be possible to determine the extent to which it was successful in recovering its costs. See Brenntag Int'l Chemicals, Inc. v. Bank of India, No. 98-7992, -- F.3d --, 1999 WL 242261, at *3 (2d Cir. Apr. 26, 1999) (finding irreparable harm in an action involving only monetary injury "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied").

MCI WorldCom stands to lose more than money if a stay is not granted. At present no group of MCI WorldCom employees is more in demand than its "information technology," or computer systems, development staff. These are the employees who build the systems that enable MCI WorldCom to "interconnect" with the regional local telephone companies and so to compete in local telephone markets, and that are addressing the substantial "Y2K" issues to assure that MCI WorldCom's customers continue to receive the service they deserve in the next century. MCI WorldCom now is devoting most of its substantial "IT" resources to these and other critical efforts. It would be a wholly unnecessary blow to MCI WorldCom and its customers to have to divert important company resources toward development of an elaborate system to resolve slamming complaints that, in the end, will most likely never even be implemented.

Additionally, because MCI WorldCom and all other industry participants cannot possibly have had the computer systems functioning by May 17, see McMahon Decl. ¶ 22, absent a stay, MCI WorldCom will have to train a workforce to perform these processing functions manually on an interim basis -- through a series of faxes, pocket calculators and other makeshift arrangements. Not only will this undertaking cost MCI WorldCom money that it can never recover, but manual processing inevitably results in errors and delay, causing customer dissatisfaction with MCI WorldCom. The loss of customer goodwill that would be the inevitable result if a stay is denied is, of course, a well-recognized form of irreparable harm. See, e.g., Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 38 (2d Cir. 1995).

Finally, the rules place MCI WorldCom in the untenable position of being forced to seek to do the impossible. Under the circumstances, the company will likely not be able adequately to satisfy its legal obligations. As a matter of law, this, too, constitutes irreparable harm. See Ruiz v. Estelle, 650 F.2d 555, 573 (5th Cir. 1981) ("We also conclude that [defendant] will suffer irreparable injury if this portion of the injunction is not stayed pending appeal. . . . . Given the magnitude of the structural and administrative changes that the injunction would require, . . . it is virtually impossible for [defendant] to implement and complete a type of reorganization plan [within the time] called for by the district court. . . ." (internal quotation omitted)).

All of this irreparable harm is imminent. MCI WorldCom and other carriers should not be subjected to this harm in advance of a conclusive determination of the Order's validity and applicability.

III. The Public Interest Would Be Served And No Other Party Would Be Harmed By The Grant Of A Stay.

The public will suffer the adverse consequences of the FCC's irrational liability rules if they are not stayed. As discussed above, implementation of the liability rules would impose significant costs on carriers that are likely to be passed on at least in part to consumers. Moreover, one of the goals of the Commission's liability rules was to mitigate the confusion and uncertainty faced by an injured customer. By insisting on the immediate implementation of rules that 1) will likely change on reconsideration; 2) will likely no longer apply in any event once a private third party administrator system is implemented; and 3) simply cannot be implemented in a workable manner in the time allowed, the Commission invites confusion that disserves the public.

There is currently in place a system for resolving slamming complaints. The public interest is best served by maintaining that system until such time as a new permanent system is settled upon and can be properly implemented. The Commission itself has acknowledged in a related context that "the public interest would best be served by ruling on the issues raised in the pending petitions for reconsideration before requiring affected parties to take actions to comply." Order, In re Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, 11 F.C.C.R. 856, ¶ 2 (1995). A stay preserving the status quo would prevent the confusion and added expense consumers will suffer if carriers are forced prematurely to seek to comply with an incoherent regime imposed by the

Commission -- confusion and expense which would be utterly needless if the Order is overturned on the merits, or if the Commission accepts the alternative private third party administration scheme that is currently under consideration.

MCI WorldCom has done everything the FCC has asked in this matter and yet is left in an impossible position. The FCC acknowledged that its rules were problematic, and asked carriers to propose alternative enforcement mechanisms. It invited carriers then to seek waivers of its rules. MCI WorldCom (along with most long-distance carriers) developed a TPA scheme, and filed the requisite waivers. Moreover, it filed these requests promptly, before 45 days of the 90-day period allowed by the Commission expired, allowing the Commission ample time to consider the waiver request and the TPA proposal. In the interim the FCC has received over a dozen requests to reconsider its ill-conceived Order. Under the circumstances, it is difficult to understand why the Commission will not stay the liability rules.

CONCLUSION

For all these reasons, the liability provisions of the Order should be stayed pending judicial review.

Respectfully submitted,

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Dated: May 4, 1999

CERTIFICATE OF SERVICE

I, Vivian Lee, do hereby certify that copies of the foregoing Motion for Stay were sent, on this 4th day of May, 1999, via first-class mail, postage pre-paid, to the following:

Chairman William E. Kennard**
Federal Communications Commission
The Portals
445 12th Street, SW, 8th Fl.
Washington, DC 20554

Commissioner Harold Furchgott-Roth**
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